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No. 456

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRED DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–13) is reported at 281 F. 2d 93.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1960 (Pet. App. 14). A petition for rehearing was denied on September 1, 1960 (Pet. App. 15). The petition for a writ of certiorari was filed on September 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

26 U.S.C. 4705(a), 68A Stat. 551, provides:

> ORDER FORMS.
>
> (A) GENERAL REQUIREMENT.
>
> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

21 U.S.C. 174, 70 Stat. 570, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug,

such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois on three counts charging three unlawful sales of heroin in violation of 26 U.S.C. 4705(a) (*supra*, p. 2), and a fourth count charging the knowing and unlawful receipt and concealment of heroin after its unlawful importation, in violation of 21 U.S.C. 174 (*supra*, pp. 2–3) (R. 3–5, 215). Petitioner, who had a record of four previous narcotics convictions (R. 217–221), was sentenced to 20 years on each count, the first two to run consecutively and the third and fourth concurrently, for a total of 40 years' imprisonment (R. 221–222). On appeal (R. 223), the conviction was affirmed (Pet. App. 1–14).

Pertinent evidence adduced at the hearing on a motion to suppress evidence, which was denied (R. 59), and at the trial may be summarized as follows:

Agent Bailey, working under cover, arranged to buy narcotics from a Miss Saunders (who testified for the government at the trial). On the evening of February 11 (Count I), Miss Saunders called petitioner and then had Bailey drive her to the vicinity of petitioner's apartment. Bailey gave Miss Saunders $75.00 which (although she did not know it) had been treated with phosphorescent powder and the serial numbers of which had been recorded. Miss Saunders pur-

chased half an ounce of heroin from petitioner in his apartment and delivered the heroin to Bailey (R. 20, 64, 96–98, 112–113, 132–133, 161–162).

On February 16, 1959 (Count II), Bailey followed substantially the same procedure in making a purchase of heroin through Miss Saunders, except that she obtained the heroin at petitioner's apartment from Bernice Toomer, who lived with petitioner (R. 21–24, 38–40, 70–71, 99–101, 113–118, 133, 128, 162).[1] On February 18, 1959 (Count III), Bailey and Miss Saunders followed a procedure similar to that on February 11 (Count I) in making still another purchase of heroin from petitioner (R. 23, 72–74, 101–102, 118–120, 133, 128, 162–163).

On February 20, 1959 (Count IV), Bailey again arranged with Miss Saunders for the purchase of $140 worth of heroin, (R. 23, 26, 75–76). At about 7:30 p.m., agent Heisig, in the company of several other agents, saw Miss Saunders enter petitioner's apartment (R. 30). Thereafter, an unidentified man, presumably an insurance agent, knocked at the door (R. 120, 121, 30). When Miss Saunders answered, Heisig, who had been about to knock, stated that he was a narcotics agent and that she was under arrest. She slammed the door and the agents forced their way into the apartment and effected her arrest (R. 30, 121, 134). Agent Bailey, who had come to the apartment (R. 23, 76), asked Miss Saunders where the heroin was and she replied that Bernice Toomer had taken it. In the back bedroom, where Mrs. Toomer

[1] The reference at R. 21 to the 17th of February is an error.

was sitting on the bed, Bailey threw back the cover and found the $140 in official advance funds and nine small manila envelopes, found to contain heroin (R. 24, 30–31, 77, 163–164). The agents found other heroin in a sweeper in petitioner's apartment (R. 135–137, 164–165).

After the seizure of the heroin, two agents were dispatched to petitioner's grocery store, where they arrested him without a warrant. They took $341 from petitioner and $500 from his partner, Mr. Howard (R. 31, 35, 78, 141, 142). Petitioner was taken to his apartment, where agent Bailey meanwhile had found $160 in a coat. When he was told that the coat had been found in his bedroom, petitioner admitted, "Everything back there is mine" (R. 31–32, 78, 79). In checking the serial numbers of the bills with his four marked money lists, agent Lipshutz found that all the $140 found in the bed, $30 of the $160 found in the coat, and $60 of the $341 taken from petitioner corresponded with the lists (R. 143, 146–147, 150–151).

DISCUSSION

1. In its charge to the jury, the trial court, in the course of its instructions on reasonable doubt and other general matters, specifically told the jury, with respect to the first three counts, that if, "from the evidence or lack of evidence, you have reasonable doubt as to whether or not the defendant sold a narcotic drug to Dorothy Saunders on February 11, 1959, February 16, 1959, and February 18, 1959, then, you should find the defendant not guilty" (R. 194).

The court then read, practically verbatim, the four counts of the indictment, including the references to 26 U.S.C. 4705(a) (Counts I, II, and III) and 21 U.S.C. 174 (Count IV) (compare R. 196–198 with R. 3–5). Following this, however, the court read as applicable to Counts I, II, and III, not 26 U.S.C. 4705(a), under which these counts were actually laid, but 21 U.S.C. 174, dealing with receipt and concealment after unlawful importation, which was the basis of the charge in Count IV involving the heroin found in petitioner's apartment on February 20, 1959. And in this connection the court read the presumption created by Section 174 (but not by Section 4705 (a)) to the effect that, where the defendant is shown to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury (R. 198). In explaining the meaning of possession, the court said that it could mean actual, manual possession, "or it may also mean constructive possession, that is, where the goods are shown to have been under the control of the person charged, although they were in the actual physical possession of another" (R. 198). The court then adverted again to Count IV, instructing the jury that, if they found beyond a reasonable doubt that petitioner had possession of the narcotics as charged in that count, "you are required to find him guilty under Count IV, unless he explains such possession to your satisfaction" (R. 199).

Neither counsel called the court's attention to its error in linking Counts I, II, and III with Section 174.

The court of appeals was of the view that, since it was evident that the trial court would have corrected the error if it had been called to its attention, petitioner was precluded from raising the issue under Rule 30, F.R. Crim. P., and that, in the light of the charge as a whole, the jury could not have been misled. It accordingly held that there was no plain error affecting substantial rights which it would notice under Rule 52(b) (Pet. App. 12–13).

We agree that the mere reading of the wrong statute would not necessarily be plain error, particularly in a case such as this where the sales were proved through the testimony of the purchaser, Miss Saunders. The difficulty we have with the charge as a whole, however, is that the court told the jury that there was applicable to Counts I, II, and III the presumption allowed by 21 U.S.C. 174, whereas the statute under which these counts were laid, 26 U.S.C. 4705(a), allows no such presumption and it could not properly play any part with respect to those offenses. It is impossible to assess the weight given to the presumption by the jury, particularly since, as to the Count II, Miss Saunders testified that she made the actual purchase from Mrs. Toomer. Under these circumstances we believe that, despite the clear evidence of petitioner's guilt, the error in the instructions was plain error within the meaning of Rule 52 (b). See *Bihn* v. *United States*, 328 U.S. 633; *Bollenbach* v. *United States*, 326 U.S. 607.

2. This error does not affect Count IV, which was based on the receipt and concealment, in violation of 21 U.S.C. 174, of the heroin found in petitioner's apartment on February 20, 1959. As to this count, the question raised is the validity of the search of petitioner's apartment incident to the arrest of Miss Saunders there. The court below properly found the search to be a valid incident of that arrest.

Petitioner complains that the agents did not have a warrant for the arrest of Miss Saunders. Under 26 U.S.C. 7607, however, federal narcotics agents have authority to arrest without a warrant on reasonable ground to believe that a person has committed an offense. The agents' dealings with Miss Saunders furnished ample probable cause for her arrest.

The agents also knew that petitioner's apartment was the source of the narcotics Miss Saunders procured for agent Bailey, and that, shortly before they entered the apartment on February 20, she had gone there to get narcotics. It was she who opened the door, and it was she who tried to bar entry when agent Heisig told her she was under arrest. She also was the one who told the agents, when they asked where the heroin was, that Mrs. Toomer had it. Under these circumstances, the agents had the right to search the apartment as an incident of the arrest of Miss Saunders. *Clifton* v. *United States*, 224 F. 2d 329 (C.A. 4), certiorari denied, 350 U.S. 894. In that case, where, with respect to liquor violations, the facts were quite similar, the Fourth Circuit said, pp. 0–331:

> If a person allows a felon to use his home for illegal purposes, then evidence obtained on a search made after arrest of the felon is admissible against the owner of the home. * * * It is not necessary that the owner be the party arrested in such a case.

See also *Marron* v. *United States*, 275 U.S. 192, where books and records seized as an incident of the arrest of an employe were admitted against the owner who was not present at the time of arrest.

The charge in Count IV was thus amply proved by the evidence of petitioner's possession of narcotics which were validly seized in his apartment. The conviction on that count should be sustained.

CONCLUSION

For the reasons discussed above, we suggest that an appropriate disposition of the case would be to grant certiorari as to Counts I, II, and III, reverse the judgment with respect to those counts, and remand them to the district court for a new trial. In other respects, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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